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OF
COLEMAN AVERY
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SUPREME COURT OF OHIO
ON JANUARY 16, 1913.
IN CASE OF
STATE OF OHIO *vs.* GEORGE B. COX.

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If the Court please: This case is here, under leave previously granted by this court, on a bill of exceptions of the Prosecuting Attorney of Hamilton County to a decision of the Court of Common Pleas of Hamilton County.

The question presented is whether the court of Common Pleas erred, as a matter of law, in granting a motion to quash an indictment for perjury against George B. Cox, for certain testimony given by him before a grand jury in 1906, on the ground that in the inquiry then made before that grand jury his constitutional rights were violated in that he was compelled in a criminal case to be a witness against himself.

In 1911 the grand jury returned an indictment against George B. Cox. The indictment charged in substance that George B. Cox was in 1906 subpoenaed to appear as a witness before a grand jury regularly impaneled and sworn and then in session in Hamilton County; that he appeared in response to the subpoena and was then and there duly sworn by the clerk of the court, truly to testify as a witness before said grand jury; and that he, so duly sworn, did then and there appear before said grand jury and in a certain proceeding before said grand jury and in a certain matter in relation to which an oath was authorized by law, that is to say, in the proceeding and matter wherein the grand jury was then and there inquiring of the unlawful deposit in banks within the County of Hamilton of moneys received in payment of taxes by the

then treasurer of Hamilton County and his predecessors in office, and the aiding, abetting and procuring by other persons in said Hamilton County of said treasurers to make said unlawful deposits, did then and there and in a matter material to the inquiry then being made therein testify as follows: That he knew nothing about the deposits of said moneys in the Cincinnati Trust Company of which he was president; that he had not been consulted about it, and had nothing to do with it; that he knew nothing about the deposit of county funds with banks of Hamilton County during the terms of Tilden R. French, Leo Schott, Rudolph K. Hynicka and John H. Gibson as treasurers of Hamilton County; that he did not know what interest they got, or what arrangements they made as to interest, and that he himself had never received, either directly or indirectly, any part of the interest or gratuities which the treasurers got as a result of said deposits; which testimony was wilfully false and corrupt, for in truth and in fact he had been consulted, and well knew and took part in the arrangements made, in regard to deposits of moneys paid to treasurers of Hamilton County as taxes in the Cincinnati Trust Company; and in truth and in fact he knew that for years the banks had been receiving deposits from the treasurers of Hamilton County; and in truth and in fact he knew that Tilden R. French, Leo Schott, Rudolph K. Hynicka and John H. Gibson, when treasurers of Hamilton County, had deposited the county funds with the banks of Hamilton County and that said banks had paid interest thereon, and that he himself had received a large part of the interest so paid, which he knew was paid as interest on the deposits, under arrangements which he well knew as aforesaid; which said matters so testified to before the grand jury were then and there material matters

in the inquiry then being made by said grand jury and which said matters so then testified by said George B. Cox to be true, he, said George B. Cox, then and there knew to be false, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Ohio.

To this indictment the accused filed a motion to quash, only three of the ten specific grounds of which were properly included in or to be considered on a motion to quash, according to the rules of criminal pleading and practice, to-wit: the fourth, sixth and seventh, which were as follows:

“4. The allegation as to the proceeding and matter pending before said grand jury is indefinite and misleading.”

“6. Said indictment charges in one count several separate and distinct alleged offenses, and is bad for duplicity.”

“7. That the averments in said indictment as to the form of the same and the manner in which said offense is charged are so vague, indefinite, uncertain and misleading that the defendant is not properly informed of the charge against him, or what he shall meet at the trial, and can not prepare his defense.”

But the Court of Common Pleas on May 20th, 1911, Hon. William L. Dickson presiding, rendered a decision granting the motion to quash on the tenth ground thereof, which was as follows:

“10. Because it appears by said indictment, that the investigation which the grand jury had under consideration at the time the defendant is alleged to have committed perjury, if it had under consideration any matter within its jurisdiction, was directed against this defendant; that it was a violation of his constitutional right to require him to attend before the grand jury and take an oath; that said alleged oath was not lawfully administered; that no indictment for perjury can be predicated upon testimony so obtained; and that said indictment so obtained is invalid under Section 10 of Article I of the Constitution of Ohio, and Section 12842 of the General Code.”

To this decision, which is set out in full in the brief we filed in this court on application for leave, the prose-

cuting attorney excepted, according to the provisions of Section 13681 of the General Code.

But when leave was sought to file the bill of exceptions in this court under the authority of Sections 13681 to 13684, inclusive, of the General Code, it was suggested by counsel for Cox, under the guise of friends of the court, that this court had no jurisdiction; that the statute which created and authorized this sort of proceedings was unconstitutional and void.

In answer to this contention it may be sufficient to say that this court has entertained jurisdiction over proceedings such as this since the first case brought here, under the statute, *State v. Behimer*, in 1870, up to the time of the suggestion by counsel for Cox on April 16th, 1912, and since the time of the point so raised by them until the most recently decided case, of which we are aware, the case of *State v. Hare and Davis*, decided December 17, 1912—a period of 42 years. Adopting the language of the Franklin Common Pleas, in the case of *Bowland v. Wolfe*, 5 Nisi Prius (New Series), 170, we may say: “In the first place it is to be observed that this law has been upon the statute books of the state for many years, and although frequently before the courts in cases involving its construction, apparently the question of its constitutionality has never been raised. After a statute has stood upon the books for such a length of time and one that has been so frequently before the courts in adjudicated cases and its constitutionality never questioned, a court ought to be very clear that it is invalid before declaring it to be so. No statute is to be declared unconstitutional unless clearly so, and that is especially so in the case of a statute which has been upon the firing line so long as the one now under consideration, and escaped unscathed.”

In the second place counsel who raise the point “have been”—to use their own language—“appointed by the judge of the court of Common Pleas ‘to argue the case against the prosecuting attorney’ as provided in General Code, Section 13682” and they “appear in pursuance of that order.” The order itself is on file with the papers in this court. It does not lie in their mouths, therefore,—indeed, it would be a violation of their order from the court below—to deny the validity of the statutes under which they have accepted their commission and appear here. To use the language of your Honor, Judge Shauck, in *State v. Vail*, 84 Ohio State, 399, at 405: “This case comes within the recognized doctrine that parties may so conduct themselves with respect to the subject of unconstitutional legislation that they are estopped thereafter to deny its binding character.” Counsel have not been appointed to tell this court that it has no right to hear the matter; they have been appointed to argue the case against the prosecuting attorney and in defense of the decision of the court below. As Mr. Justice Swayne says in *Daniels v. Tearney*, 102 United States, 415: “It is well settled that where a party has availed himself for his benefit of an unconstitutional law, he can not aver its unconstitutionality as a defense. In such cases the principle of estoppel applies with full force and conclusive effect.”

But lastly, as we have endeavored to show—and we think with success—in our briefs, these statutes are not unconstitutional; the authority they confer and the duty they impose upon the court is the exercise of “appellate jurisdiction” within the meaning of the constitutional provision: “The Supreme Court shall have such appellate jurisdiction as may be provided by law.” And the question this Court is asked to decide in this proceeding

is not moot; it has not ceased to be of practical importance to the parties; it is still one of great public importance, and in it the rights of the public (whatever they are) have not been extinguished.

The question ought to be decided and the statute says this Court shall decide it.

The question itself may be briefly stated thus: A and B while Treasurers of H County have deposited with certain banks in said county certain portions of the public money received and held by them as such treasurers. A grand jury is duly impaneled and sworn and proceeds to inquire into the facts to determine whether A and B should be indicted for embezzlement under Section 6841, Revised Statutes. C, President of the X Trust Company, is subpoenaed to appear as a witness before that grand jury. He appears in response to his subpoena and is sworn by the clerk of the court. He goes before the grand jury and, without objection or claim of privilege, testifies that he did not know of, or have anything to do with, any deposits of public money by A and B in the X Trust Company or any other banks of H County, whereas, as a matter of fact he did know of, and took part in the arrangements made in regard to, deposits of public moneys by A and B in the X Trust Company and other banks in H County and had knowingly received from them a large part of the interest paid by said banks on deposits so made. He is subsequently, and without further appearance on his part, indicted by another grand jury for perjury upon that false testimony. Can he escape prosecution for perjury on the ground that when he appeared and was sworn and gave testimony, as stated, his constitutional right was violated, in that he was “compelled in a criminal case to be a witness against himself”?

Counsel for Cox contended he could and Judge Dickson so decided and that too on a motion to quash the indictment. "A motion to quash may be made where there is a defect apparent upon the face of the record, including defects in the form of the indictment, or in the manner in which an offense is charged." But Judge Dickson bases his conclusion not upon the form or allegations of the indictment but upon assumption and surmise. He says that the indictment must be quashed "because it appears by said indictment: First, That the investigation which the grand jury had under consideration at the time the defendant is alleged to have committed perjury was directed against this defendant."

Where, we ask, does it appear from the indictment that the investigation which the grand jury had under consideration at the time the defendant is alleged to have committed perjury was directed against the defendant? A perusal of the indictment will show that the grand jury were investigating unlawful deposits, in banks of Hamilton County, by treasurers of Hamilton County of money received by them as such in payment of taxes, in order that the grand jury might determine whether any of said treasurers had been guilty of a violation of Section 6841, Revised Statutes, as it then stood. The only possible way to make it out that the grand jury were investigating Cox is that he had aided and abetted the treasurers to make illegal deposits and that the grand jury either knew or suspected that he had done so and were after him for it. But nothing of the sort appears upon the face of the indictment or the record. And if Cox was an aider and abettor of such illegal depositing, as Judge Dickson seems willing, without any hearing, to conclude that he was, can an aider and abettor of crime get immunity for the aiding and abetting by denying his con-

nection therewith in his testimony before the grand jury, and also immunity for any perjury he may commit in giving before the grand jury, without any objection or claim of privilege, his said testimony of denial? Judge Dickson is confused between cases of criminals being compelled against their will to give the evidence upon which an indictment is subsequently found against them for the very crime then under investigation and cases of individuals having some knowledge of the crime of another, through some participation therein or connection therewith, appearing before a grand jury in response to a subpoena and there giving testimony, without compulsion, but testimony for one reason or another in material respects false.

If it were true that the indictment showed on its face that the grand jury were investigating the acts of Cox to see if he had aided and abetted the treasurers in making the illegal deposits, it does not show that he was compelled to testify, that he declined or refused to testify, or claimed his privilege of refusing to testify and was, notwithstanding his protest, compelled to testify. And no presumptions in that regard can be indulged in for on the motion to quash we are concerned only with defects apparent on the face of the record, including defects in the form of the indictment or in the manner in which the offense is charged. The case of *Lindsey v. State*, 69 Ohio State, 215, is in point. In that case, in which your Honor, Judge Shauck, sat and concurred, this court held:

Syllabus 1. "A plea which states that the defendant was required, against his will, to take an oath and give testimony before the grand jury concerning a case then being investigated against the defendant and his co-defendants but which does not state how he was thus compelled to take an oath, nor that he refused to take it, nor that he claimed his privilege of refusing to testify, and which fails to show what he testified to, or that his testimony was material concerning any fact necessary to be proven

by the state to justify the finding of an indictment, or that there was not testimony other than that of defendant before the jury sufficient to justify such indictment, is bad on general demurrer.”

If this, then, were a case of indictment of Cox for the very crime under investigation at the time of the testimony he could not escape from the indictment without a showing of the things enumerated in *Lindsey v. State*; and how then can he, when there is nothing in the indictment to show, or even indicate, that he was compelled, over his objection and refusal and claim of privilege, to testify before the grand jury, escape, by motion to quash, from an indictment for perjury for the willfully false statements he then gratuitously made, on the pretense that his constitutional rights have been violated! Counsel for defendant can cite no cases in which a motion to quash has been granted on such a ground.

But having assumed that the grand jury were investigating the acts of Cox with a view to indicting him—when, as a matter of fact, there was no charge against him, which the grand jury were investigating when he was called before them in 1906, nor does the indictment allege any or the record disclose any—Judge Dickson next concludes that the indictment must be quashed because: Second, “It was a violation of his constitutional right to require him to attend before the grand jury and take an oath.”

We submit that Judge Dickson was confused by confounding the rights of a party with the privilege of an ordinary witness. In *United States v. Kimball*, 117 Federal, 156, Judge Thomas, of the Southern District of New York, distinguishes the right of a defendant to stand mute from the privilege of a witness to refuse to answer; that the former does not spring from the Constitution but from the common law status, and says: “A person

can not be regarded as a defendant, so as to render him such an incompetent witness until some process is directed against him, that is, until he is selected by some judicial method as a subject of accusation.” Cox had not been so selected; he was not an accused in any sense of the word; he was called as an ordinary witness before a grand jury making a general investigation in regard to the public funds of the county.

In this connection we wish to direct the court’s attention to the language of Judge Hough in *United States v. Price and Haas*, 163 Federal, 904, at 906:

“The constitutional provision is but the affirmance of the common law maxim ‘*Nemo tenetur seipsum accusare.*’ It can not be understood without knowledge of the common law rule, and is to be interpreted thereby. It is intended solely to prevent disclosures by persons acting as witnesses in any investigation and has no logical or historical relation to the rights of parties as such. * * * The immunity of a party in a criminal case rests likewise upon a rule of common law, long antedating the Constitution, and quite different from the rule regarding self-accusation, viz: the exclusion from the witness stand of all parties to the record because their interest was thought to be so great as to render them unworthy of belief. This rule was not changed by the Constitution and existed in full force in most English speaking courts until almost within the memory of men still living. The constitutional provision is therefore, as said by Professor Wigmore, in his illuminating discussion of the subject, ‘An option of refusal, and not a prohibition of inquiry.’ Wigmore on Evidence, Section 2268.”

That case was a prosecution arising out of an investigation of the so-called “cotton leak” before a Federal grand jury in the city of New York and in it Judge Hough of the Circuit Court of the Southern District of New York, sitting as a District Judge, denying a motion to quash the indictment, made upon the same grounds as the one in the case at bar, said: “The real and only questions raised by the motions to quash are narrow but important matters of law; *i. e.*, were these defendants (1)

compelled to be witnesses against themselves (2) in a criminal case?" Answering the second query he says: "The true doctrine established by national courts of controlling authority is that the submission of an indictment to a grand jury and the examination of witnesses before them in relation to the same are 'no part of criminal proceedings against the accused, but are merely to assist the grand jury in determining whether such proceedings shall be commenced.' Price and Haas were not parties, but as witnesses claim a party's statutory (not constitutional) privilege. Regarding these men as witnesses only, it is settled law that no right either constitutional or statutory was infringed by compelling their attendance and administering the oath."

A person does not become "a witness against himself" by merely being subpoenaed to appear before a grand jury. In *United States v. Kimball*, already referred to, Judge Thomas first answered the claim that Kimball and the others were defendants as follows: "That a person not even the subject of a complaint is a defendant is the merest chimera." Continuing, he said, on page 162: "Returning, now to the first general proposition, for which the defendants contend"—"that an obeyed summons to the defendants to appear before the grand jury, and consequent evidence touching matters thereafter charged in an indictment against them violated the constitutional provision that no person 'shall be compelled in a criminal case to be a witness against himself'"—"it will be found that the defendants seek in effect to establish that under the constitutional provision no person, except upon his own request, is a competent witness before a grand jury touching matters made the subject of an indictment against him by such grand jury; that is, an indictment found by a grand jury is illegal, if the

person charged in it attended before the grand jury pursuant to subpoena, and, even without objection, gave material evidence, especially if he were not warned or enabled to know that inquiry might bring him into jeopardy. The United States attorney tersely interprets the defendant's construction of the constitutional provision, as follows:

“(1). It would mean that the grand jury as an inquiring body has no right to issue its process to any person who might know or have knowledge concerning any crime to be investigated, if there should be any chance that the person so subpoenaed might in any way become criminally involved in the crime under investigation, and therefore subject to an indictment, and would entail upon that body the impossibility of ascertaining, in advance, whether there could be any chance of the witnesses' culpability becoming apparent. (2) It would mean that an indictment would be invalid if the person against whom it was found had been subpoenaed to appear before the grand jury, had appeared, and had been interrogated concerning the participation of any other person in the charge. (3) It would absolutely destroy the usefulness of a grand jury to inquire into crimes generally, or into violations that have been brought to their notice, other than cases that had been held for the grand jury by the respective committing magistrates. (4) It would mean that the compulsion denounced in the constitutional amendment begins the moment the process of the grand jury is actually served upon the party to whom it is directed, provided he is in any way connected with the event.”

Answering this contention he says on page 163: “It is not infringement of constitutional provision to subpoena a person before a grand jury and to administer to him the usual oath. The defendants correctly state: ‘It is well settled that a witness can not claim his constitutional privilege until he is sworn. He must take the oath, so that his assertion of privilege shall be made under that sanction.’ If a person can not claim his privilege until he has been sworn, it logically follows that the constitutional provision can not until that time be violated. It can not be violated before it can be in-

voked for his protection; hence the conclusion is that compulsion, within the meaning of the Constitution, does not arise from mere summoning and swearing the witness.”

In addition to the two reasons we have thus far discussed Judge Dickson decided further that the indictment must be quashed because: Third, “The alleged oath was not lawfully administered.” Fourth, “No indictment can be predicated upon testimony so obtained,” and Fifth, “The indictment is invalid under Section 10 of Article I of the Constitution of Ohio.” We will take up these grounds briefly and in order.

There is absolutely nothing to show that the oath averred was not lawfully administered. The oath averred was the required legal oath according to Section 7199, Revised Statutes, now Section 13564, General Code. After he was sworn, if he was afraid the testimony he would give might tend to incriminate him, he could have declined to answer. If he did not avail himself of his privilege he waived it and was subject to the same rules and obligations as any other witness. And if he gave false testimony he was indictable for perjury. As Mr. McClain says in his work on criminal law, Section 865:

“If a witness could have interposed an objection to being called to testify in the matter, but waived it, perjury may be predicated upon his false answer.”

And Bishop, Section 1019:

“The witness, to be capable of perjury, need not be brought into court by subpoena, or be otherwise compellable to testify; and it is immaterial whether he proceeds reluctantly or voluntarily. Even though a witness is in law incompetent, if in fact the court admits him, he commits perjury when what he testifies to is false. So that, for example, whether a statute has made parties witnesses in their own causes or not, it is perjury for one to swear falsely for himself in a matter duly pending. So though a question to a witness is one

which he may lawfully decline to answer, as where it requires him to criminate himself, still by voluntarily answering it falsely he commits perjury.”

The rule is well stated in the case of *Mackin v. The People*, 115 Illinois, 312, Syllabus 3:

“If the answers of a witness to questions put to him by a grand jury, would have the effect of disclosing criminal conduct on his part, he may claim his privilege and decline to answer, and his refusal can not form the basis of any prosecution against him; but if he does not avail of his privilege, and submits to answer, he must testify with as much truth and candor as in other cases; and if his testimony is willfully false, perjury may be assigned upon it.”

In that case Mackin was indicted for perjury for certain testimony given by him before a grand jury investigating election frauds. He had been asked in regard to the printing and delivery of certain spurious ballots used in the election. He denied having procured the printing or having received the package of ballots.

On page 320 Judge Scott said:

“Complaint is made that defendant was asked the direct question whether he ordered the spurious ballots, and whether he received them after they had been engraved and printed. Doubtless the same questions in substance were asked of the printers and the engraver, all of whom answered without hesitation what connection they had with them. Had defendant been guiltless of any criminal use to be made of such spurious ballots thereafter, he could have answered as freely as did the other witnesses, and no one would have pretended any charge against him was being inquired into by the grand jury. Assuming the answers to the questions propounded to defendant would have disclosed criminal conduct on his part, it was his privilege to decline to answer, and his refusal could not have been made the basis of any prosecution against him. Of course no one can be compelled to give evidence against himself, and the law secures to every one when testifying in any legal proceeding, whether before the grand jury or in the trial court, the privilege to answer or to decline to answer, if, in his opinion, the answers to the questions would tend to disclose matters that might criminate him. The privilege secured is, however, a personal one, and if he shall waive it, and elect to testify, he must do so with as much

truth and candor as if testifying concerning other matters as to which he is bound to answer, and if his testimony is willfully false, perjury may be assigned upon it.”

The principle of law is well settled by an abundance of cases, a few of which we have cited in our briefs. In *United States v. Bell*, 81 Federal, 830, Judge Hammond, on pages 850 and 851 says:

“It must be conceded to the district attorney that it has been repeatedly and quite uniformly decided everywhere, under many varying conditions of fact, that where one who is incompetent as a witness, or for any reason is not subject to examination, is nevertheless compelled to testify, or does in fact testify, he must tell the truth, and perjury may be prosecuted against him if he does not.”

The indictment is not invalid under Section 10 of Article I of the Constitution of Ohio. Section 10 of Article I provides that “no person shall be compelled in any criminal case to be a witness against himself.” It does not provide, however, either expressly or by implication that a person can go forward and, without objection, give false testimony in a criminal case, directly or indirectly concerning himself, with impunity. As the Chief Justice of the Supreme Court of the United States says in *Glickstein v. United States*, 222 United States, 139, at 142, “the immunity afforded by the constitutional guarantee relates to the past and does not endow the person who testifies with a license to commit perjury.”

Judge Thomas of the Circuit Court of the Southern District of New York in the case, already cited, of *United States v. Kimball*, speaking of the provision of the Fifth Amendment of the Constitution of the United States, which is identically the same as that in our Section 10, Article I, says on page 163:

“The provision means that no person shall be forced to be a witness against himself against his free will. This does not

mean that he could not testify. It does not mean that any person may not be called and sworn (barring persons under known legal disability). It is an exception that leaves all persons competent to be witnesses, subject to a call to testify, but enables any of such persons to exempt himself from the whole class by pleading that certain evidence which he is called upon to give will tend to show that he has committed an offense. Hence those competent and free-willed to do so may give evidence against the whole world, themselves included; but those unwilling may not be coerced, if it appear that unwillingness arises from incriminating evidence which they are asked to give. But willingness or unwillingness is subjective and may be known alone by act, conduct, speech or perhaps, in extreme cases, by condition. Unless the witness exhibit his unwillingness in some manner, it can not be presumed to exist. This is especially true, if his conduct be that of a man untrammelled, if he be free from bodily restraint or physical duress, unterrified by menace, and uninfluenced by cajolery or fraud. Presumptively the person summoned belongs to the general body of citizens, competent to testify, and so he may be considered. If he elect to be excepted from this class he must speak, or his condition or relation to the proceeding must speak for him; for exceptions are allowed only to those who ask for them."

No unwillingness or compulsion of any sort whatsoever is apparent on the face of the record or the indictment here. As a matter of law and of fact there was none.

All of the cases cited by counsel for defendant and quoted by the court below in support of its decision, except *People v. Gillette* and *United States v. Bell*, are cases of indictments for other offenses than perjury which have been secured by compelling the defendants charged thereunder to appear before the grand jury and testify against themselves, incriminating themselves of the very charge under investigation and for which the indictments are returned. These indictments are held to be obtained by illegal evidence. The cases are not in point here and indeed it is very doubtful if they would have any application at all in Ohio. If such matters could be presented they would have to be presented under a plea in abate-

ment—as a “defect in the record,” “shown by facts extrinsic thereto”—as was done in the Lindsey case, 69 Ohio State, 215. And the attitude of this court on the question is revealed in that case. It is not in accord with the authorities cited by court and counsel for Cox. I will not read but only direct the attention of the Court to the language of Judge Spear on page 222.

In the cases of *People v. Gillette* (111 New York Supplement, 133), and *United States v. Bell* (81 Federal, 830) the indictments were not disposed of on motions to quash.

In *People v. Gillette*, a trial had been had and defendant found guilty when the matter was discussed. And the matter upon which the charge of perjury was predicated in that case was the answer of the defendant before a grand jury, inquiring to ascertain whether an insurance company, of which accused was an officer, had violated the criminal laws relating to insurance companies, to a question as to what a certain account in a bank at Dobb's Ferry was. He said that it was his personal account and that the money there deposited came from his personal account; he went on to explain, however, that he had from time to time received various amounts of cash from certain officers of the insurance company to be used for confidential purposes in the interest of the company; that the money was deposited in the Dobb's Ferry Bank in the account referred to, and that the money, in fact, belonged to the insurance company and that he had for some time endeavored to return it. And the decision of the court, after a trial on the merits, was—as the head-notes show—First, That this evidence was insufficient to show that the testimony given, when considered as a whole was wilfully and corruptly false, and Second, That the witness could not be convicted of perjury for false

testimony which he immediately thereafter fully explained so that the whole constituted a truthful statement of fact.

These two grounds are the last two grounds stated by Judge McLaughlin; the language on pages 135 and 136 from which Judge Dickson quotes, is the mere notion of McLaughlin and Ingraham. It was not concurred in by the other three judges of the court and is therefore pure dictum. And the reasoning of Judge McLaughlin in this respect is thus characterized by Judge Hough in *United States v. Price and Haas*: “The constitutional view, which by confounding the privilege of a witness with the rights of a party (or to speak more accurately the exclusion of a party) makes a suspect a person sacrosanct.” Of this he says: “The extent and nature thereof is reviewed in *People v. Gillette*, 111 New York Supplement, 133, and from the reasoning of that case I respectfully dissent.”

In the case of *United States v. Bell*, the matter did not come up until the trial. It arose on a question as to the admissability of evidence. The court held that the affidavit of the defendant Bell which had been secured by the Pension Examiner, by a private examination in his office, was not admissable because it had been secured in violation of defendant's constitutional rights as revealed by the evidence. The court excluded the evidence, the government consequently failed to prove a case and a verdict of acquittal was directed. This is a very different thing than quashing an indictment on a mere pretense, a figment of the brain of counsel, a legal bugaboo intended to frighten and alarm, but without any basis in fact whatsoever. The Bell case falls within the rule expressed by Judge Thomas in *United States v. Kimball* that, “willingness or unwillingness is subjective, and

may be known alone by act, conduct, speech, or perhaps, in extreme cases by condition.” For on pages 850 and 851, Judge Hammond says:

“It must be conceded to the district attorney that it has been repeatedly and quite uniformly decided everywhere, under many varying conditions of fact, that where one who is incompetent as a witness, or for any reason is not subject to examination, is nevertheless compelled to testify or does in fact testify, he must tell the truth, and perjury may be prosecuted against him if he does not. But this principle and these cases are all answered by the peculiar circumstances in this case, which we find conclusive of the fact that this untutored, uninformed, unwarned and unconscious negro did not waive his privilege and constitutional right, and was answering under a compulsion as potential for him as if he had been under physical, as he was under mental duress.”

We do not believe it will be contended that Cox—then “Boss” of Hamilton County—who had selected and put in office the sheriff who served the subpoena, the clerk who administered the oath, and the very prosecuting attorney who interrogated him before the grand jury, should be considered as in the same class and condition as the defendant, Bell, who is described by Judge Hammond, in that case as “an ignorant negro man.” “accustomed to obedience to white men, and particularly obedience to those having or assuming authority over him to command,” and who “does not have the appearance or demeanor of a self-assertive and aggressive man, and is not a person who would be likely to protect himself by assertiveness and aggressiveness, without being sustained by the advice of others,” and who “brought before an official for whom naturally he must have great regard in respect to his authority, is taken into the office of the official, which, while it is a public office, is not an open court, but more like a private corner; and separate and apart from all the world, with only those two, he is

subjected to a close, presumably artful, and necessarily an inquisitorial examination.”

Judge Hammond does not disagree with nor dispute the general rule. On page 840, he says:

“To avoid all misapprehension, it may be stated once for all that if a citizen fully cognizant of his privilege abandons it under compulsion or otherwise, and essays to speak under oath before an authorized officer, he must speak the truth, and may be prosecuted for perjury if he does not.”

Such we may say of Cox. If an indictment for perjury does not lie against George B. Cox for the wilfully false statements he made before the grand jury in 1906 it will be because we have adopted and applied to this case and in this country that doctrine of the English Common Law, “The King can do no wrong”; and not because of any provision of the Constitution of the State of Ohio or the Constitution of the United States.

We respectfully submit that the Court of Common Pleas erred in granting the amended motion to quash and that the exceptions of the Prosecuting Attorney of Hamilton County to that decision should be sustained.

Trials.

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DATE

ISSUED TO

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